Malaysian International Merchant Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–223 OF 1998
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
13 JANUARY 2001

Banking *— Banker and customer — Bank not ascertaining and verifying information in soliciting purchase of shares in a company — Whether bank a mere finder of purchasers of share in a company — Whether bank owes a higher duty of care than that of a mere finder*

Banking *— Banker and customer — Duty of care — Whether bank owes a legal duty of care to ascertain and verify all information supplied by a company before passing on to purchaser — Whether there was negligence*

The respondent claimed that the appellant had represented and induced them to invest in a company resulting in a loss. The first representation was said to contain in a letter of offer sent by the appellant to the respondent in which it was stated that the directors of the company had guaranteed a dividend of 24%pa. The other representations, which could be inferred from the oral and documentary evidence given to the respondent, were that the company was a respectable company and was of sound financial standing. Subsequently the respondent discovered that the directors's guarantee of 24% dividend pa was in fact false. It also turned out that the company was in fact not of sound standing and subsequently went into receivership. The appellant admitted that they gave all those information but contended that all those information were information obtained from the company and that the appellant's role was merely that of a finder, ie to get the respondent to be in touch with the company and the rest was between the respondent and the company. The High Court entered judgment for the respondent. The appellant appealed.

Held, dismissing the appeal:
In the light of the position of the appellant as merchant bankers, they could not be heard to say that they were merely playing the role of a finder of purchasers of the shares of the company. Being merchant bankers, they owed a higher duty to the respondent than that of a mere finder. The appellant ought to ascertain and verify all information supplied by the company before passing on to the respondent. The respondent succeeded in establishing that the appellant owed a legal duty of care to the respondent and in making the representation, there was negligence which resulted in a loss to the respondent (see p 379B–D, F–G); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 followed.

[Bahasa Malaysia summary

Responden menyatakan bahawa perayu telah merepresentasi dan mendorong responden supaya melabur didalam sebuah syarikat yang mengakibatkan kerugian. Representasi yang pertama dikatakan mengandungi sepucuk surat tawaran yang dikirim oleh perayu, dimana pengarah-pengarah syarikat menjamin dividen sebanyak 24%pa. Representasi-representasi yang lain yang dapat disimpul daripada keterangan lisan dan dokumentar yang diberi kepada responden adalah bahawa syarikat tersebut bereputasi baik dan mempunyai kedudukan kewangan yang kukuh. Berikutannya, responden mendapat tahu bahawa jaminan pengarah-pengarah mengenai dividen 24%pa adalah palsu. Syarikat tersebut juga tidak mempunyai kedudukan kewangan yang kukuh dan telah memasuki jawatan penerimaan. Perayu mengaku memberi maklumat tersebut tetapi telah menegaskan bahawa segala maklumat diterima daripada syarikat tersebut dan perayu hanya bertindak sebagai penghubung untuk menggesa responden supaya menghubungi syarikat tersebut, dan yang lain adalah diantara responden dan syarikat. Mahkamah Tinggi telah mencatatkan penghakiman untuk responden. Perayu merayu.

Diputuskan, menolak rayuan tersebut:

Memandangkan kedudukan perayu sebagai pegawai dagangan bank, perayu tidak boleh mengatakan bahawa mereka hanya bertindak sebagai penghubung pembeli saham syarikat. Sebagai pegawai dagangan bank, perayu mempunyai kewajipan yang lebih tinggi terhadap responden berbanding dengan penghubung. Perayu sepatutnya memastikan dan menentusahkan segala maklumat yang diberi oleh syarikat sebelum memberikannya kepada responden. Responden telah membuktikan bahawa perayu mempunyai kewajipan berjaga-jaga terhadap responden, dan dalam membuat representasi tersebut, terdapat kecuaian yang mengakibatkan kerugian kepada responden (lihat ms 379B–D, F–G); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 diikut.]

Notes

For cases on banker and customer, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1271–1305.

Cases referred to

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575 (folld)

Appeal from: Suit No C–148 of 1981 (High Court, Kuala Lumpur)

Porres P Royan (*Shook Lin & Bok*) for the appellant.
Liza Chan (*Liza Chan & Co*) for the respondent.

Shaik Daud JCA. (delivering judgment of the court): This appeal is from

the decision of the High Court, which had, on 24 March 1998, entered judgment for the respondent. The respondent is a body incorporated under the Trustee (lncorporation) (FM) Ordinance 1952, while the appellant are merchant bankers.

The gist of the respondent's claim against the appellant is that, the appellant's officer had represented and induced the respondent to make monetary investment in a company called Texsyn Fibres Industries Sdn Bhd ('the company') resulting in a loss. The respondent claim damages in the sum of RM401,200. It is the contention of the respondent that they were induced into making the investment by the representations made by the officer of the appellant. The respondent allege that the appellant's officer made three basic representations, one positively in writing while the other two can be inferred from the oral and documentary evidence given to the respondent. The first direct representation was that the directors of the company had guaranteed a dividend of 24%pa for each share for a period of three years, which representation is contained in a letter of offer dated 8 November 1974 sent to the respondent. The second representation was that the company was a respectable company and the third was that the company was of sound financial standing.

According to the amended statement of claim, the company solicited the services of the appellant as merchant bankers, to procure bumiputra purchasers of certain shares in the company. According to the evidence of one Tan Sri Abdul Aziz, the respondent's chairman, that one day in 1974 one Mohamed Tajuddin, the Corporate Finance Officer of the appellant, phoned him to ask whether he was interested in investing in the company. He said Mohamad Tajuddin also told him that the company was a very large concern with a paid up capital of RM20m with prominent personalities from Malaysia, Hong Kong and Taiwan on its board. Following this Tan Sri Abdul Aziz received a letter dated 8 November, 1974 from Mohamad Tajuddin, bearing the letterhead of the appellant. As this letter is the central issue in this claim, we think it pertinent to reproduce it in extenso.

Private & Confidential

MIMB
Malaysian International Merchant
Bankers Bhd
8 November 1974

Sirs,

Sales offer of 2.75m shares of Texsyn Fibre Industries Private Ltd

Texsyn Fibre Industries Private Ltd

Texsyn Fibre Industries Pte Ltd, an industrial company offers for sale 2.75m shares to Bumiputras. Herewith attached information regarding the said company for your kind consideration.

Important particulars regarding this offer are as follows:

1 shares offered for sale (amounting to 2.75m) is $12^{1}/_{2}$% of the grand total of the ordinary shares of the said company.

2 Price of each share has been fixed at RM1.33.

3 The directors guarantee a dividend payment of 24% per year per share for three consecutive years from the date of purchase of this offer. The guarantee is given on a personal undertaking only.

4 Any reduction in dividend payment shall be borne by the guarantors. If the company makes profit exceeding the minimum dividend guaranteed for any one year within the three years, then share holders are required to pay back the said reductions to the guarantors.

5 Annual dividend assured gives an understanding that cash dividend paid from the trade profit of the company (inclusive of Bonus Dividend) but excluding the capitalisation of surplus of revaluation of the said company's assets.

6 The guaranteed dividend cannot be transferred from the initial purchasers to the subsequent buyer. The sales terminate the offer at the time of transfer.

7 Those genuine buyer of this shares are offered free airline tickets to visit the company plant at Prai.

If this offer is attractive, please contact us as soon as possible. Then we shall arrange for a meeting between our directors and you.
Sincerely,
Mohd Tajuddin

Apart from the above letter, Mohamad Tajuddin also sent another letter dated 22 January 1975, to the effect that the company had made a profit of RM313,000 for the month of October 1974.

Mohamad Tajuddin in his evidence admitted that he gave all those information to Tan Sri Abdul Aziz but added that all those information were not made up by him but were information obtained from the company. He further added that the appellant's role in this deal was merely that of a finder, ie to get the respondent to be in touch with the company and the rest was between the respondent and the company.

According to Tan Sri Abdul Aziz in reliance of the representation, the respondent did purchase 200,000 of the designated shares in the company at RM1.33 per share totalling RM266,000. It turned out that the so called guaranteed dividend of 24%pa never materialized and what the respondent received as dividend was a mere RM8,800 on 7 July 1977, which fell far short of the guaranteed dividend that the respondent ought to have received on their investment of RM266,000. It also turned out that the company was in fact not of sound standing and went into receivership on 31 October 1978. Subsequently, the respondent discovered that the directors' guarantee of 24%pa for three years, was in fact false. Nowhere in any of the documents supplied by the company was any mention made of this guarantee of 24% dividend pa. What was contained in a letter from the company dated 9 September 1974, was that the company was prepared to increase the dividend guarantee from 1% per month to 24%pa. It is clear that Mohamad Tajuddin had twisted this and made a false representation to the respondent.

On the evidence before him the learned judge found that Mohamad Tajuddin failed to ascertain or verify with the company on the accuracy of the guaranteed dividend of 24%pa and that he had indeed painted a rosy

but false picture of the company's financial standing to the respondent. Indeed, the learned judge also found that the appellant failed to include a disclaimer as to their responsibility for the information supplied to the respondent.

Learned counsel for the appellant in his submission while conceding that the first representation was made, said that there were no evidence to support that the other two representations were in fact made. On the issue of the 24% guaranteed dividend, he added that while the appellant conceded that it was made, he reiterated that it was not a false representation and that it was made based on information supplied by the company. In the light of the position of the appellant as merchant bankers, it is our view that they cannot be heard to say that they are merely playing the role of a finder of bumiputra purchasers of the shares of the company and that whatever information they supplied to the respondent were simply passed on from the company. It is our view that being merchant bankers, they owe a higher duty to the respondent than that of a mere finder. They certainly owe a higher burden when supplying any information from the company to the respondent. They ought to ascertain and verify all information supplied by the company before passing on to the respondent. We agree that the first representation was actually made as it is contained in the letter from Mohamad Tajuddin to Tan Sri Abdul Aziz but we cannot agree that it was not false. The representation that the directors of the company guaranteed a dividend of 24%pa for three years was indeed a false one, as found by the learned judge. Nowhere in the documents supplied by the company was there any mention of this guaranteed dividend. In the light of this, we find that the representation is a false one and on this score alone we could have dismissed the appeal. As conceded by learned counsel for the respondent, the other two representations were indeed not made but they can be inferred from the totality of the evidence. As mentioned earlier, the appellant through Mohamad Tajuddin, painted a rosy picture of the company that it was a financially sound company and also gave the impression that any investment in it would not be a risk. Relying on these, the respondent invested in the company. It is our view that the respondent succeeded in establishing that the appellant owed a legal duty of care to the respondent and in making the representation, there was negligence which resulted in a loss by the respondent. Based on the principle laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, the appellant owed a legal duty to exercise such care as the circumstances require in making the representations and for their failure to do so this action for negligence was justified.

We are in agreement with the findings of the learned judge that the appellant owed a duty of care in making the representation to the respondent resulting in the loss suffered by the respondent. We have no reason to interfere with those findings. The appeal is hereby dismissed with costs, and the deposit is to go to the respondent account of their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar